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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA
SAN JOSE DIVISION

IN RE: LENOVO ADWARE LITIGATION

This Document Relates to All Cases

Case No. 5:15-md-02624-RMW

THE STERLING PLAINTIFFS' REPLY
MEMORANDUM IN FURTHER SUPPORT OF
THEIR MOTION FOR APPOINTMENT OF
INTERIM CLASS COUNSEL

Date: July 17, 2015
Time: 9:00 a.m.
Courtroom: 6, 4th Floor
Judge: Hon. Ronald M. Whyte

I. INTRODUCTION

Four competing motions for appointment of interim lead counsel have been filed in this MDL litigation and there have now been two rounds of briefing. Each movant has had a full and fair opportunity to present the qualifications of its proposed counsel and to demonstrate how its counsel satisfy the six criteria that the Court will apply to select lead counsel. Each of the four movants agrees that all proposed counsel have the willingness, availability and resources to commit to the litigation. Each movant also agrees that all proposed counsel generally are experienced in managing complex litigation. There is disagreement among some movants as to whose proposed counsel is the most knowledgeable and experienced with respect to the consumer protection and privacy claims at issue in this litigation. There also is disagreement among some movants as to whose proposed counsel has done the most to research and investigate the claims and advance the interests of the class.

The Sterling Plaintiffs submit that the Court need not attempt the difficult task of determining which movant's proposed counsel has the most experience or did the most to advance the interests of the class. Only Sterling Plaintiffs' Counsel satisfy all six criteria set out by the Court, including most notably, the ability to work cooperatively with other firms and develop a concrete plan to litigate the case in a manner that will maintain reasonable fees and expenses. As the only movant that has satisfied all six of the Court's criteria, the Sterling Plaintiffs' motion to appoint Cotchett, Pitre, & McCarthy LLP, Girard Gibbs LLP, and Pritzker Levine LLP as interim co-lead class counsel should be granted and the competing motions filed by the Pick, Wood and Babbitt plaintiffs should be denied.

II. ARGUMENT

Each of the four movants has now had two opportunities to demonstrate that its proposed counsel satisfy the six principal criteria set forth in the Court's June 26, 2015 Case Management Order that the Court will apply to select lead counsel for plaintiffs in the litigation. *See* Dkt. No. 8 at p.7. As discussed below, only the Sterling Plaintiffs have satisfied all six criteria.

A. The Sterling Plaintiffs' Motion

In their motion and response, the Sterling Plaintiffs demonstrated their counsels' willingness, availability and resources to commit to the litigation and significant experience managing complex litigation. None of the other movants challenge this showing. The Sterling Plaintiffs also documented

1 their counsels' extensive knowledge and experience with respect to the consumer protection and privacy
 2 claims that are at issue in this litigation, in addition to all of the work done by Sterling Plaintiffs'
 3 Counsel to research and investigate the claims and advance the interests of the class. While the Pick
 4 Plaintiffs claim that their counsel have even more experience with respect to privacy cases, and the Pick
 5 and Wood Plaintiffs claim that their counsel also did extensive work researching and investigating the
 6 claims and advancing the interests of the class, none of the movants deny that Sterling Plaintiffs'
 7 Counsel have significant experience with respect to the consumer protection and privacy claims that are
 8 at issue in this litigation, and have worked to research and investigate the claims and advance the
 9 interests of the class.¹

10 The only criterion left is the ability to maintain reasonable fees and expenses. In their motion,
 11 the Sterling Plaintiffs demonstrated that they alone satisfy this criteria in three different ways. First,
 12 because Sterling Plaintiffs' Counsel are based in this District, the class will not have to pay for the time
 13 and expense to fly lawyers in for hearings, depositions and meetings. Other than Mr. Saveri (counsel for
 14 Babbitt), the lead lawyers for the Pick and Wood plaintiffs reside elsewhere. The Pick Plaintiffs' lead
 15 counsel are in San Diego, Boca Raton and Chicago, and the Wood Plaintiffs' lead counsel are in Boston
 16 and Greensboro, North Carolina. Second, because Sterling Plaintiffs' Counsel regularly practice in this
 17 District, they are fully familiar with the local rules and practices of this Court, an efficiency that will
 18 also redound to the benefit of the class. Third, and most important, Sterling Plaintiffs' Counsel
 19 proposed a specific case management plan that would allow the litigation to be prosecuted in an efficient
 20 manner that will reduce unnecessary and expensive motion practice. None of the other movants even
 21 referenced a case management plan and none have disputed the Sterling Plaintiffs' ability to maintain
 22 reasonable fees and expenses.

23 **B. The Pick Plaintiffs' Motion**

24 The Pick Plaintiffs seek to have Robbins Geller Rudman & Dowd LLP and Edelson PC
 25 appointed as co-lead counsel for the class. The Pick Plaintiffs' motion should be denied because they
 26

27 ¹ The Pick Plaintiffs contend that their counsel are more experienced with respect to privacy law, but
 28 they are silent as to the consumer protection claims that are equally important in this litigation. And that
 is because no movant's counsel have as much experience successfully litigating consumer protection
 class actions as Sterling Plaintiffs' Counsel.

1 have failed to satisfy two of the six lead counsel criteria. In particular, the Pick Plaintiffs have made no
 2 showing that their counsel (i) have worked cooperatively with the other plaintiffs' firms in this litigation,
 3 or (ii) have a plan to maintain reasonable fees and expenses.

4 The Pick Plaintiffs, in their motion, tout the ability of their counsel to work with each other, and
 5 behind the scenes with defendants, but they are silent about their counsels' ability to work with any of
 6 the other plaintiffs' firms in the litigation, and for good reason. As discussed in the Sterling Plaintiffs'
 7 motion and response, the Pick Plaintiffs' counsel, like the Wood Plaintiffs' counsel discussed below,
 8 proposed or implemented strategies that elicited virtually no support from other plaintiffs' counsel. The
 9 Pick Plaintiffs' counsel filed an MDL transfer motion advocating for the Eastern District of North
 10 Carolina without conferring with any other plaintiffs' counsel about this strategy. They then implored
 11 other counsel to stay their cases voluntarily, while at the same time setting up an undisclosed meeting
 12 with defendants' counsel to obtain discovery and information – a point that defendants dispute, but even
 13 if true, such discovery or information was never shared with any other plaintiffs' firms. And they tried
 14 to engage defendants in pre-centralization settlement discussions without the benefit of discovery and
 15 contrary to the better judgment of other plaintiffs' counsel. This is hardly a record demonstrating the
 16 ability to work cooperatively with other plaintiffs' counsel.²

17 The Pick Plaintiffs state generally that they will maintain reasonable fees and expenses. In their
 18 opening brief, the Pick Plaintiffs claim they will “maximize efficiency,” by having a streamlined
 19 structure, but they never say how they will litigate the case in a manner that will maintain reasonable
 20 fees and expenses.³ Nor do the Pick Plaintiffs explain why it would be beneficial or cost effective for
 21 the class to have lawyers in San Diego, Boca Raton and Chicago, when the case is in San Jose and
 22 equally qualified firms are located nearby. In their response, the Pick Plaintiffs simply state that because
 23 they know the facts and the law the best, this will allow them to proceed most efficiently. Sterling
 24 Plaintiffs dispute the accuracy of this statement, but even if it was true, the Pick Plaintiffs never explain
 25 how they will do this.

26
 27 ² The Pick Plaintiffs had another opportunity to satisfy this criteria in their response, but did not do so.

28 ³ The streamlined structure the Pick Plaintiffs reference in their motion is little different from the
 structure proposed by either the Sterling Plaintiffs or the Wood Plaintiffs.

C. The Wood Plaintiffs' Motion

The Wood Plaintiffs seek to have Van Laningham Duncan PLLC and Block & Leviton LLP appointed as co-lead counsel for the class. The Wood Plaintiffs' motion should be denied because they have failed to satisfy at least two of the six lead counsel criteria.⁴ In particular, the Wood Plaintiffs have made no showing that their counsel (i) have worked cooperatively with the other plaintiffs' firms, and (ii) have any knowledge of or experience with the consumer protection and privacy claims that are at issue. The Wood Plaintiffs talk at length in their response about how their counsel have worked cooperatively with a number of the other movants' counsel in other cases. *See* Dkt. No. 20 at pp. 10-11. But this case has now been pending for almost five months, and what is noticeably absent from the Wood Plaintiffs' response is any showing that their counsel have worked cooperatively with any other firms in this litigation. To the contrary, as explained in the Sterling Plaintiffs' response, the Wood Plaintiffs' counsel chose a "go-it-alone" strategy that has found no support from any other plaintiffs' firm in the litigation. *See* Dkt. No. 21 at p. 6.

The Wood Plaintiffs attempt to defend their inability to attract the support of other counsel by suggesting that such support is a bad thing. They say that the appointment of lead counsel should not be a popularity contest and that deferring to a popular vote can encourage counsel to award titles and fabricated assignments. *See* Dkt. No. 20 at pp. 9-10. True, although if it were simply a popular vote, the Sterling Plaintiffs would win, since they have by far the most support among all of the movants. But this argument by the Wood Plaintiffs misses the point. The reason the Sterling Plaintiffs have so much support is not because their counsel are popular or have promised to award titles and work assignments, but because they have worked cooperatively for the past five months with most of the other firms to organize and advance the litigation. These efforts satisfy three of the six criteria for appointment of lead counsel (ability to work cooperatively, experience managing complex litigation and work done to move the case forward).

⁴ In their motion, the Wood Plaintiffs point to their preliminary injunction motion as evidence of work done by their counsel to advance the interests of the class. Lenovo's response disposes of the Wood Plaintiffs' contention. *See* Dkt. No. 16 at p. 4. Because the Wood Plaintiffs have failed to meet other criteria, their motion can be denied, and no extended discussion of the merits of the Wood Plaintiffs' injunction motion is needed.

1 And in any event, the support of other counsel for the Sterling Plaintiffs' motion has been hard-
 2 earned, not "bought" through the promise of any titles or assignments. Sterling Plaintiffs' Counsel have
 3 not made any agreements, formal or otherwise, with any of the firms supporting their motion. There
 4 have been no "conferences" and no "lunches." There are no fee deals, no promises of titles, committee
 5 or work assignments, and no "vote-trading across cases." Simply put, none of the "problematic
 6 practices" the Wood Plaintiffs allude to in their response occurred here or will occur if the Sterling
 7 Plaintiffs' motion is granted.

8 **D. Plaintiff Babbitt's Motion**

9 Plaintiff Babbitt seeks to have the Joseph Saveri Law Firm, Inc. appointed lead counsel for the
 10 class.⁵ The Babbitt motion should be denied because Mr. Babbitt has failed to satisfy four of the six
 11 lead counsel criteria. In particular, Mr. Babbitt has made no showing that his counsel (i) has worked
 12 cooperatively with the other plaintiffs' firms in this litigation, (ii) has any knowledge of or experience
 13 with the consumer protection and privacy claims that are at issue in this litigation, (iii) has done
 14 anything at all to advance the interests of the class in the litigation, and (iv) has a plan to maintain
 15 reasonable fees and expenses.

16 Even in the absence of the foregoing criteria, Mr. Babbitt still contends that his counsel should
 17 be appointed lead because he purchased his computer directly from Lenovo and only his counsel
 18 asserted a RICO claim with two predicate acts and claims under New York law. These contentions
 19 reflect a lack of familiarity with the litigation and should disqualify the Babbitt motion from any further
 20 consideration. The *Wood* complaint, filed more than two months earlier than the *Babbitt* complaint,
 21 asserts a RICO claim with multiple predicate acts. At least three complaints filed months earlier than
 22 the *Babbitt* complaint assert multiple claims under New York law. And, to the extent it matters, Mr.
 23 Babbitt was the very last plaintiff to file his case and appear in the litigation, but certainly not the first to
 24 have purchased his computer directly from Lenovo.

25 //

26 //

27
 28 ⁵ Babbitt did not file any response to the competing motions filed by the Sterling, Pick and Wood
 plaintiffs.

III. CONCLUSION

For all of the foregoing reasons, the Court should grant the Sterling Plaintiffs' motion to appoint Cotchett Pitre, Girard Gibbs and Pritzker Levine as interim co-lead class counsel and deny the motions by the Pick Plaintiffs, Plaintiff Babbitt and the Wood Plaintiffs.

Dated: July 13, 2015

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ATTESTATION

I, Jonathan K. Levine, am the ECF user whose ID and password are being used to file this document. In compliance with Local Rule 5-1(i)(3), I hereby attest that all other signatories listed have concurred in this filing.

/s/ Jonathan K. Levine

Jonathan K. Levine